

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-5533-00
JAMoon

date:

to: Chief, Examination Division, Southern California District
Attention: [REDACTED], CEP Case Manager
[REDACTED], CEP Team Coordinator
CE: [REDACTED], Santa Ana

Audie Sturla, Group Manager, Employment Tax
Tony Lloren, Employment Tax Specialist
FE: 1417, Santa Ana

from: June Y. Bass, Associate Area Counsel, LMSB
Joyce M. Marr, Attorney
Jenny A. Moon, Attorney

subject: Request for Pre-Review of Non-docketed Significant Advice
Taxpayers: (1) [REDACTED] (EIN [REDACTED]),
(2) [REDACTED] (EIN [REDACTED]), and
(3) [REDACTED] (EIN [REDACTED])
Issue: Executing Forms SS-10 and Forms 4016 for years prior to
[REDACTED]
Statute of Limitations: [REDACTED]

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THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-
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A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE
THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH
JURISDICTION OVER THE CASE.

The purpose of this memorandum is to modify and supplement our prior advice, dated December 5, 2000, in light of the fact that Exam has decided to secure an individual Form SS-10, "Consent to Extend the Time to Assess Employment Taxes," from the following three entities:

1. [REDACTED] (EIN [REDACTED])
2. [REDACTED] (EIN [REDACTED]), and
3. [REDACTED] (EIN [REDACTED]).

Another purpose of this memorandum is to recommend that you obtain a transferee consent, Form 4016, "Consent Fixing Period of Limitation Upon Assessment of Employment or Miscellaneous Excise Taxes Against a Transferee," from the successor corporation for each of the foregoing entities.

Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through [REDACTED]. Furthermore, our advice herein is applicable for tax years prior to (but not including) the [REDACTED] year.

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent should be obtained from the corporation into which the entity was merged:

1. [REDACTED] (EIN [REDACTED])
2. [REDACTED] (EIN [REDACTED]), and
3. [REDACTED] (EIN [REDACTED]).

CONCLUSIONS

1. [REDACTED]

a. Since there are conflicting facts as to whether [REDACTED], was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as follows:

- i. [REDACTED]
(EIN [REDACTED]) (formerly known as [REDACTED])

[REDACTED] as successor in interest to [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]); and

ii. [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]).

b. Yes, you should obtain a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED] for relevant years prior to [REDACTED].

In the space labeled "(Name)", you should insert:

"[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])."

2. [REDACTED]

a. Again, since there are conflicting facts as to whether [REDACTED] was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as follows:

i. [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]) as successor in interest to [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]); and

ii. [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]).

b. Yes, the Form 4016 should be obtained from [REDACTED] for the employment tax liabilities of [REDACTED] for the relevant years prior to [REDACTED].

¹ If you know that [REDACTED] was formerly known as [REDACTED], you can modify all applicable parentheticals to read: (formerly known as [REDACTED] and [REDACTED]).

In the space labeled "(Name)", you should insert:

" [REDACTED] (EIN [REDACTED])
(formerly known as [REDACTED]) ."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED])
(formerly known as [REDACTED]) ."

3. [REDACTED]

a. Again, since there are conflicting facts as to whether [REDACTED] was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as follows:

i. [REDACTED]
(EIN [REDACTED]) (formerly known as [REDACTED]
[REDACTED] as successor in
interest to [REDACTED] (EIN [REDACTED])
(also known as [REDACTED])
(formerly known as [REDACTED]
[REDACTED])²; and

ii. [REDACTED] (EIN [REDACTED]) (also
known as [REDACTED] (formerly known
as [REDACTED]) .

b. The Form 4016 should be obtained from [REDACTED] for the employment tax liabilities of [REDACTED] for relevant years prior to [REDACTED].

In the space labeled "(Name)", you should insert:

" [REDACTED] (EIN [REDACTED])
(formerly known as [REDACTED]) ."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED])
[REDACTED] (also known as [REDACTED])
(formerly known as [REDACTED]) ."

² If you know that [REDACTED] was also formerly known as "[REDACTED]," you can modify all applicable parentheticals to read: (formerly known as [REDACTED] and [REDACTED]) .

The Forms SS-10 and 4016 may be signed by a duly authorized officer of the respective entity, or an agent or attorney of such entity who is specifically authorized to execute the form by a power of attorney. Please double check all EINs and current addresses.

FACTS

1. [REDACTED]

As stated in our prior memorandum, dated December 5, 2000, [REDACTED] ("old-[REDACTED]"; EIN [REDACTED]), a Delaware corporation, formed three corporations in [REDACTED] including [REDACTED] (EIN [REDACTED]). On [REDACTED], a reorganization took place such that old-[REDACTED] became a wholly-owned subsidiary of [REDACTED].

In [REDACTED] of [REDACTED], [REDACTED] changed its name to [REDACTED] ("new-[REDACTED]"; same EIN as [REDACTED]) and old-[REDACTED] changed its name to [REDACTED]. See LEXIS record and various IDRS transcripts for [REDACTED], attached hereto as Exhibits A and B, respectively.

On [REDACTED], [REDACTED] changed its name to [REDACTED].

The merger documents (that were attached as Exhibit G to our December 5, 2000 memorandum) provided that effective [REDACTED], [REDACTED] was to merge "with and into" [REDACTED], an Indiana corporation, with [REDACTED] as the surviving corporation; the separate corporate existence of [REDACTED] was to cease upon the merger. See ¶ 2.1 of the Plan of Merger.

Paragraph 2.2 of the Plan of Merger stated in part, "[REDACTED] shall assume and be responsible and liable for all liabilities and obligations of [REDACTED] as required by Indiana law."

Article IX of the Plan of Merger states that it was to be governed by the laws of the State of Indiana.

We are unable to determine from the various IDRS transcripts

³ [REDACTED] became a wholly-owned first tier holding company of new-[REDACTED].

(Exhibit B), dated [REDACTED], whether [REDACTED] did, in fact, merge out of existence. The [REDACTED] transcript for [REDACTED]'s EIN shows a cross-reference to EIN [REDACTED], which belongs to new-[REDACTED]. Conversely, an [REDACTED] transcript for new-[REDACTED] (attached hereto as Exhibit C) cross-references [REDACTED] EIN with a code "SB," which we presume means "subsidiary." Further, a LEXIS record (Exhibit A) shows the corporate status of [REDACTED] as "surrendered," not "merged out," see, e.g. LEXIS printout for [REDACTED] (attached hereto as Exhibit D); in fact, the LEXIS record for [REDACTED] does not mention a merger. Thus, it is unclear whether [REDACTED] was merged out of existence as provided for in the merger documents.

2. [REDACTED]

The merger documents (attached hereto as Exhibit E) provided that effective [REDACTED], [REDACTED], a Delaware corporation, was to merge "with and into" [REDACTED] with [REDACTED] as the surviving corporation; the separate corporate existence of [REDACTED] was to cease upon the merger.

Paragraph 2.2 of the Plan of Merger provided, "[REDACTED] shall assume and be responsible and liable for all liabilities and obligations of [REDACTED] as required by Indiana law."

The merger was to occur in accordance with Indiana law. See ¶ 2.1 and Article IX of the Plan of Merger.

An [REDACTED] transcript for [REDACTED] (attached hereto as Exhibit F), dated [REDACTED], cross-references the EIN of new-[REDACTED], with a code "PR," which we presume means "parent." Also, a LEXIS record (attached hereto as Exhibit G) shows: (a) [REDACTED]'s corporate status as "active," (b) that its parent corporation is "[REDACTED]," a California corporation⁵, and (c) that prior to [REDACTED], its name was "[REDACTED]." Thus, again, it is unclear whether [REDACTED] was merged out of existence as provided for in the merger documents.

⁴ An [REDACTED] transcript was not available for [REDACTED].

⁵ We are not aware of a corporation named "[REDACTED]" that is incorporated in the State of California. Both new-[REDACTED] and old-[REDACTED] were Delaware corporations.

3. [REDACTED]

The merger documents (attached hereto as Exhibit H) provided that effective [REDACTED] a California corporation "doing business as [REDACTED]" was to merge "with and into" [REDACTED], with [REDACTED] as the surviving corporation; the separate corporate existence of [REDACTED] was to cease upon the merger.

Paragraph 2.2 of the Plan of Merger provided, "[REDACTED] shall assume and be responsible and liable for all liabilities and obligations of [REDACTED] as required by Indiana law."

The merger was to occur in accordance with Indiana law. See ¶ 2.1 and Article IX of the Plan of Merger.

Contrary to the merger agreements, the various LEXIS printouts (attached hereto as Exhibit I) show: (a) [REDACTED]'s corporate status as "active," (b) that its parent corporation is "[REDACTED]," a California corporation⁶, (c) that its DBA or assumed name is "[REDACTED]" and/or "[REDACTED]" (d) that it has other DBA names, and (e) that its prior names were "[REDACTED]" and "[REDACTED]." See also [REDACTED] transcript, dated [REDACTED], attached hereto as Exhibit J. Thus, as with the other two entities, it is unclear whether [REDACTED] was merged out of existence as provided for in the merger documents.

Regarding [REDACTED], into which the foregoing entities purportedly merged, a LEXIS printout and [REDACTED] transcript (attached hereto as Exhibit K) show that its prior names were "[REDACTED]" and "[REDACTED]."

DISCUSSION

I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

⁶ See note 5.

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

IND. CODE ANN. § 23-1-40-6(a)(3) (Burns 2000) provides that "[w]hen a merger takes effect . . . [t]he surviving corporation has all liabilities of each corporation party to the merger"

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

A. Forms SS-10

The merger agreements, by which the three entities purportedly were merged into [REDACTED], are substantially the same. They all provided that the mergers were to be governed by the laws of the State of Indiana, and that the surviving corporation (i.e. [REDACTED]) would assume or succeed to the liabilities of the merged corporations.

Thus, according to Indiana law and the terms of the merger

agreements, [REDACTED] is primarily liable, as a successor in interest, for the employment taxes of each of the three entities. Consequently, you should secure Forms SS-10 from [REDACTED], as the successor in interest, for the employment tax liabilities of each of the three entities.

Further, given some conflicting facts as to whether these three entities still exist, in an abundance of caution, we recommend that you also obtain a Form SS-10 from each of these entities.

2. Form 4016

The Service could reasonably argue that [REDACTED] is a transferee at law for each entity by virtue of the contractual liabilities provided for in the merger documents. Thus, we recommend you secure Forms 4016 from [REDACTED], as a transferee, for the employment tax liabilities of each of the three entities.

If you have any questions, please contact Jenny A. Moon at 949-360-3431 or Joyce M. Marr at 949-360-2688.

Attachments:

Exhibit A: A LEXIS record for [REDACTED]

Exhibit B: Various IDRS transcripts for [REDACTED]
[REDACTED]

Exhibit C: An [REDACTED] transcript for EIN [REDACTED]

Exhibit D: A LEXIS record for [REDACTED]

Exhibit E: Merger documents for [REDACTED]

Exhibit F: An [REDACTED] transcript for [REDACTED]

Exhibit G: A LEXIS record for [REDACTED]

Exhibit H: Merger documents for [REDACTED]

Exhibit I: Various LEXIS records for [REDACTED]
[REDACTED]

Exhibit J: An [REDACTED] transcript for [REDACTED]
[REDACTED]

Exhibit K: A LEXIS record and an [REDACTED] transcript for [REDACTED]